Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-35-94
ZAKARIA YATIM, NH CHAN AND MAHADEV SHANKAR JJCA
20 FEBRUARY 1995

Banking *— Security for advances — Guarantee — Conclusive evidence clause — Effect of — Guarantors precluded from requiring bank to prove accuracy of certificate of indebtedness — Whether also prevented from showing manifest error or fraud — Whether court bound by clause*

Banking *— Security for advances — Guarantee — Liability — Whether bank must establish debtor's liability before enforcing guarantee against guarantor — Effect of clause stating that bank could pursue remedies against guarantor without first pursuing remedies against debtor*

Evidence *— Conclusive evidence clause — Effect of — Whether guarantors prevented from adducing evidence to show manifest error or fraud — Whether court bound by contractual provision — Whether plaintiff required to prove debt — Evidence Act 1950*

Evidence *— Documentary evidence — Bankers' Books (Evidence) Act 1949 — Applicability to certificate of indebtedness — Effect of conclusive evidence clause in guarantee — Bankers' Books (Evidence) Act 1949 ss 3, 4 & 5*

Civil Procedure *— Summary judgment — Defence of mere denial — Rules of the High Court 1980 O 14*

The respondent ('the bank') obtained summary judgment under O 14 of the Rules of the High Court 1980 against the appellants ('the guarantors') under two separate guarantees given in respect of a loan and overdraft facility advanced by the respondents to a company, Campall Industries Sdn Bhd ('Campall'). The guarantors have appealed. The arguments raised by the guarantors were that: (i) before the bank could proceed against the guarantors, it had first to establish the liability of Campall; and (ii) the certificates of indebtedness tendered under cl 3.19 of the guarantees were not conclusive because they did not comply with the Bankers' Books (Evidence) Act 1949 and because the officer had not certified that the documents were identical to the books in the bank.

Held, dismissing the appeal:

(1) When an application is made for summary judgment under O 14 supported by an affidavit showing that there is no defence, the defendants must show cause why leave to defend must be given. The defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. Here, the guarantors' affidavits

merely relied on the defence pleaded, which consisted of bare denials and unsustainable points of law.

(2) The guarantors' argument that before the bank could proceed against the guarantors, it had first to establish the liability of Campall, did not merit contention because cl 3.21 of each guarantee specifically provided that the bank was entitled to pursue the guarantors without first availing itself of its legal remedies against Campall.

(3) Even though the guarantors were contractually precluded from requiring the bank to prove the accuracy of the certificate, they were not prevented from adducing evidence to show that there was a manifest error on the face of the certificate or fraud. The court is not bound by the contractual provision and when there is evidence which casts doubts on its accuracy, the court should not accept the certificate as conclusive. It is then for the plaintiff to prove the quantum of the debt claimed in accordance with the Evidence Act 1950. In this appeal, counsel for the guarantors had conceded there was no manifest error on the face of the certificates.

(4) The Bankers' Books (Evidence) Act 1949, especially ss 3, 4 and 5, only applies where bankers desire to put in evidence their original books or entries but do not wish to release custody of the originals. The Act permits proof by way of certified copies and has nothing to do with the production of a certificate of indebtedness which is an original document and which the debtor has contractually bound himself to have admitted in evidence against him.

[Bahasa Malaysia summary

Responden ('bank itu') telah mendapatkan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap perayu ('penggerenti itu') di bawah dua gerenti berasingan berkaitan dengan suatu pinjaman dan kemudahan overdraf yang diberikan oleh responden kepada sebuah syarikat, Campall Industries Sdn Bhd ('Campall'). Penggerenti telah membuat rayuan. Hujah yang ditimbulkan oleh penggerenti adalah bahawa: (i) sebelum bank itu boleh bertindak terhadap penggerenti itu, ia mesti terlebih dahulu membuktikan liabiliti Campall; dan (ii) perakuan-perakuan keterhutangan yang diberikan di bawah fasal 3.19 penggerenti boleh dipertikaikan kerana mereka tidak mematuhi Akta Buku Banker (Keterangan) 1949 dan kerana pegawainya tidak mengesahkan bahawa dokumen tersebut adalah serupa dengan buku yang disimpan di dalam bank.

Diputuskan, menolak rayuan itu:

(1) Apabila sesuatu permohonan untuk penghakiman terus di bawah A 14 disokong oleh suatu afidavit yang menunjukkan bahawa tidak terdapat pembelaan, defendan mesti menunjukkan kausa

kenapa kebenaran untuk memasukkan pembelaan harus diberikan. Defendan mesti memberikan jawapan bersumpah yang merupakan bukti bahawa mereka mempunyai pembelaan yang sesuai untuk dibicarakan. Penafian semata-mata di dalam pembelaan tidak merupakan bukti. Ia merupakan cabaran kepada pihak yang berlawanan untuk menunjukkan bukti. Di sini, afidavit penggerenti hanya bergantung pada pembelaan yang dinyatakan, yang terdiri daripada penafian semata-mata dan perkara undang-undang yang tidak dapat dipertahankan.

(2) Hujah penggerenti bahawa sebelum bank itu boleh bertindak terhadap penggerenti, ia mesti terlebih dahulu membuktikan liabiliti Campall, tidak bermerit kerana fasal 3.21 di dalam setiap gerenti memperuntukkan secara spesifik bahawa bank itu berhak bertindak terhadap penggerenti tanpa menggunakan remedinya terhadap Campall terlebih dahulu.

(3) Walaupun penggerenti dihalang oleh kontrak daripada meminta bank itu membuktikan ketepatan perakuan itu, mereka tidak dihalang daripada mengemukakan keterangan untuk menunjukkan bahawa terdapat kesilapan yang nyata pada muka perakuan itu atau fraud. Mahkamah tidak terikat oleh peruntukan kontraktual itu dan apabila terdapat keterangan yang menimbulkan keraguan tentang ketepatannya, mahkamah tidak seharusnya menerima perakuan itu sebagai tidak boleh dipertikaikan. Dalam keadaan sedemikian, terpulangnya kepada plaintif untuk membuktikan kuantum hutang yang dituntut mengikut Akta Keterangan 1950. Di dalam rayuan ini, peguambela pihak penggerenti telah mengaku bahawa tidak terdapat kesilapan yang nyata pada muka perakuan tersebut.

(4) Akta Buku Banker (Keterangan) 1949, terutamanya ss 3, 4 dan 5, hanya terpakai di mana sesuatu bank ingin mengemukakan buku atau catatan asalnya sebagai keterangan tetapi tidak ingin melepaskan jagaan dokumen asal tersebut. Akta itu membenarkan pembuktian melalui salinan diperakui dan tidak kena-mengena dengan pengemukaan sesuatu perakuan keterhutangan yang merupakan suatu dokumen asal dan berkenaan dengan mana penghutang telahpun mengikat diri secara kontraktual supaya boleh dikemukakan sebagai bukti terhadapnya.]

Notes

For cases on the Bankers' Books (Evidence) Act 1949, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 701–702.

For cases on guarantees, see 1 *Mallal's Digest* (4th Ed) paras 904–926; [1990] Mallal's Digest 29; [1991] Mallal's Digest 110–118; [1992] Mallal's Digest 84–87; [1993] Mallal's Digest 61–64.

For cases on the defence of mere denial in applications for summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3295–3296.

Cases referred to

Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA [1973] 2 Lloyd's Rep 437 (folld)
Bank Bumiputra Malaysia Bhd v Perbadanan Kemajuan Negeri Perak [1989] 1 MLJ 502 (folld)
Bank of Commerce (M) Bhd v Tan Boon Soon [1995] 1 AMR 156 (distd)
Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5 (folld)
Bangkok Bank Ltd v Prosperity Shipping & Trading (Pte) Ltd & Ors [1990] 1 MLJ xxix (folld)
Chartered Bank v Cheviot Industries (M) Sdn Bhd & Anor [1988] 2 CLJ 859 (folld)
Chung Khiaw Bank Ltd v Bhojwani & Anor [1990] 2 MLJ 146 (folld)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (folld)
Development & Commercial Bank Bhd v Abdullah bin Ismail & Anor [1989] 1 CLJ 190 (folld)
Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors [1990] 1 MLJ 12 (folld)
D & C Bank Bhd v Datuk Krishna Kumar Sharma [1988] 2 CLJ 453 (folld)
D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & Ors [1990] 2 CLJ 58 (folld)
Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643 (folld)
MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180 (folld)
Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors [1990] 2 CLJ 72 (distd)

Legislation referred to

Bankers' Books (Evidence) Act 1949 ss 3, 4, 5
Evidence Act 1950
Rules of the High Court 1980 O 14, O 18 r 19

Appeal from: Civil Suit No D3–22–1108–93 (High Court, Kuala Lumpur)

V Pradhan (Skrine & Co) for the respondent.
Dr S Balasekaran (Bala & Co) for the appellant.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): We dismissed this appeal against the summary judgment obtained by the respondent bank ('the bank') against the appellants. Our reasons now follow.

On 6 September 1989, the bank agreed to provide a loan ('the loan') of RM1.5m to Campall Industries Sdn Bhd ('Campall'). On 15 October 1990, the bank agreed to provide a further loan by way of an overdraft

facility ('the facility') to the amount of RM1.6m. In consideration of agreeing to provide the loan and the facility, the appellants executed one contract of guarantee in respect of the loan and another contract of guarantee in respect of the facility.

Both contracts were in identical terms except as to the dates and the amount aforesaid. The liability of the appellants ('the guarantors') were joint and several. The guarantors undertook to pay on demand all sums advanced to Campall together with the interest thereon.

As at 1 March 1993, the bank had advanced to Campall under the loan and the facility, the total sum of RM3,027,357.35. The interest on this principal sum as on that date was RM554,972.34. The cumulative amount was thus RM3,582,329.59 ('the debt').

On 18 May 1993, the bank's solicitors sent each of the guarantors a letter by registered post demanding payment of the debt within 14 days. None of the guarantors replied to this letter, let alone suggesting that they had any defence to the claim. On 7 September 1993, the process server of the bank's solicitor personally left at the last known address of the third, fifth and sixth defendants at Batu Pahat another letter of demand dated 27 August 1993 for the said debt. These modes of service were expressly authorized by the said guarantors. The second demand also went unheeded.

These proceedings were filed on 4 April 1994. All the guarantors entered appearance. An amended defence was filed on 16 December 1993. It was followed shortly afterwards by the bank's application praying for summary judgment under O 14 or alternatively, for the defence to be struck out under O 18 r 19 of the Rules of the High Court 1980.

The bank's application was supported by the affidavit affirmed by its senior vice-president, who deposed to the facts herein before set out. Both the guarantees were exhibited. Clause 3.19 read as follows:

> ... that a certificate by an officer of the bank as to the money and liabilities for the time being due or incurred from or by the borrower to the bank shall, in the absence of manifest error, be conclusive evidence in any legal proceedings against the guarantor or any of them;

Also exhibited were the demand letter to Campall dated 30 November 1992, which set out full details of the moneys advanced, two certified statements of account dated 6 December 1993 showing the moneys and liabilities due to the bank on the loan, and on the facility, two demand letters and the process server's affidavit.

When an application is made for summary judgment under O 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.

At the hearing in the court below, the first line of argument they raised was that before the bank could proceed against the guarantors, it had first to establish the liability of Campall. This did not merit contention because cl 3.21 of each guarantee specifically provided that the bank was entitled to pursue the guarantors without first availing itself of its legal remedies against Campall.

The second line of argument was that the certificates of indebtedness tendered under cl 3.19 of the guarantees were not conclusive because they did not comply with the Bankers' Books (Evidence) Act 1949 and because the officer had not certified that the documents were identical to the books in the bank.

In the court below, VC George J rejected this argument out of hand. Before us it was raised again.

In *D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & Ors* [1990] 2 CLJ 58 at p 60, VC George J said this:

> Section 4.01 provides that the guarantee will be in addition to other security and by s 7.04 it was agreed that a certificate of indebtedness by an authorized officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the first defendant.
>
> In the instant case there is such a certificate of indebtedness under the hand of an authorized officer the plaintiff bank.
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> The judgment of Shankar J in *MIMB v G & C Securities* (KL HCCS 23–1657–86) (unreported) and the judgment of *Bank Bumiputra Malaysia Bhd v Doric Development Sdn Bhd & Ors* [1988] 1 MLJ 462 at p 463 provided authority for the proposition that such a certificate is indeed binding unless there is manifest error.

Similar statements can be found in the following cases:

(i) *Development & Commercial Bank Bhd v Datuk Krishna Kumar Sharma* [1988] 2 CLJ 453 at p 456;

(ii) *Chartered Bank v Cheviot Industries (M) Sdn Bhd & Anor* [1988] 2 CLJ 859 at p 860;

(iii) *Development & Commercial Bank Bhd v Abdullah bin Ismail & Anor* [1989] 1 CLJ 190 at p 191;

(iv) *Bank Bumiputra Malaysia Bhd v Perbadanan Kemajuan Negeri Perak* [1989] 1 MLJ 502;

(v) *Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors* [1990] 1 MLJ 12;

(vi) *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 at pp 182–183; and

(vii) *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72.

These cases go back to a Supreme Court decision *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) approved *Dobbs v National Bank of Australasia Ltd*

(1935) 53 CLR 643 and *Bache & Co (London) Ltd v Banque Vernes Et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437.

There is also a line of Singapore cases starting with *Bangkok Bank Ltd v Prosperity Shipping & Trading (Pte) Ltd & Ors* [1990] 1 MLJ xxix (where Shaun Chan AR went so far as to hold that to allow an application for further and better particulars of the quantum of the debt would emasculate the 'conclusive evidence' clause), *Bangkok Bank v Cheng Lip Kwong* [1990] 2 MLJ 5 and *Chung Khiaw Bank Ltd v Bhojwani & Anor* [1990] 2 MLJ 146.

Before us, counsel for the guarantors confined himself to the fourth headnote of *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72, and read us the passage in Siti Norma Yaakob J's judgment at p 74. A proper understanding of the passage requires a consideration of the previous paragraphs but for the present purpose it will suffice if we reproduce the passage read and the paragraph immediately preceding it:

> There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7%pa in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.
>
> In the light of such apparent likelihood of the first defendant's account being incorrect, the application cannot be intended to have the effect of circumventing cl 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the first defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under cl 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

We were also referred to *Bank of Commerce (M) Bhd v Tan Boon Soon* [1995] 1 AMR 156 at p 168 where T Selventhiranathan JC referred to the passed just cited and then said:

> Similarly, in this case, although the second defendant had disputed the sum claimed by alleging that no credit had been given for the realization of the securities given and there was evidence to this effect in the widely divergent sums claimed from the first defendant as compared with that from the second defendant, yet the plaintiff steadfastly refused to show how the different sums were arrived at, claiming that it was so privileged under the guarantee. With respect, this cannot be the position in law. Otherwise the court would be lending itself to even the making of false or exaggerated claims by plaintiffs by allowing non-accountability clauses in guarantees to be abused to the extent of the plaintiffs seeking total refuge behind their wording.

In his judgment, Shaun Chan AR referred to 15 *Halsbury's Laws of England* (3rd Ed) at para 278. In the present context, that passage should be understood to mean that even though the guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, it does not prevent the guarantors from adducing evidence to show that

there is a manifest error on the face of the certificate or fraud. The initial onus is on the guarantors. The *court* is not bound by the contractual provision in the guarantee. When evidence is produced which casts doubts on the accuracy of the certificate, it should not accept the certificate as conclusive. It is then for the plaintiff to prove the quantum of the debt claimed in accordance with the requirements of the Evidence Act 1950.

In the two judgments just cited where Siti Norma Yaakob J and T Selventhiranathan JC declined to accept the certificate, there was evidence of manifest error. In the case heard by Shaun Chan AR (and his decision is deserving of the utmost respect) there was no such evidence. Indeed in this appeal before us, Mr LH Ng of counsel (who appeared with Dr Bala), conceded there was no manifest error on the face of the certificates. In such a situation, a fishing expedition for errors in the guise of an application for further and better particulars would be unwarranted.

Counsel for the guarantors took exception to VC George J's observation that the guarantors had to go back to the borrower if they wished to obtain verification of the account. Counsel seems to have overlooked the obligation of secrecy the bank owes its customer, not to mention the time, expense and inconvenience involved in supplying copies of the entire history of a borrower's bank account.

The only other point we need to deal with is the contention that the certificate under cl 3.19 of the guarantee was invalid because it had not followed the statutory mode of proof provided by the Bankers' Books (Evidence) Act 1949 especially ss 3, 4 and 5. With respect, this submission was wholly misconceived. This Act applies where bankers desire to put in evidence their original books or entries therefrom but do not wish to release custody of the originals. The Act permits proof by way of certified copies provided by the Act. It has nothing to do with the production of a certificate of indebtedness which is an original document and which the debtor has contractually bound himself to have admitted in evidence against him.

Having dismissed this appeal, we ordered costs to be paid both here and in the court below by the appellants and the deposit be paid out to the respondents in satisfaction pro tanto of its taxed costs.

Appeal dismissed.

Reported by Anne Khoo